IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
File No.: 1:07-CV-231-LHT-DLH

C. BURGESS, Plaintiff, v. EFORCE MEDIA, INC., IWIZARD HOLDING, INC., ADKNOWLEDGE, INC., BASEBALL EXPRESS, INC., ALLEN-EDMONDS SHOE CORPORATION, INTERSEARCH GROUP, INC., TRUSCO MANUFACTURING COMPANY, PRICEGRABBER.COM, INC. SHOPZILLA, INC., DAZADI, INC., SIX THREE ZERO ENTERPRISES, LLC, Defendants.	)	**MEMORANDUM IN SUPPORT OF RULE 12(B)(6) MOTION TO DISMISS BY DEFENDANT ALLEN EDMONDS SHOE CORPORATION**

Defendant Allen Edmonds Shoe Corporation ("Allen Edmonds"), through counsel, submits this memorandum of law in support of its motion to dismiss the Complaint of Plaintiff C. Burgess. Pursuant to Fed. R. Civ. P. 12(b)(6), Allen Edmonds moves to dismiss Plaintiff's "Count Two" claims of invasion of privacy and trespass because Plaintiff has failed to state claims upon which relief may be granted. To the extent that Plaintiff has implied a cause of action based upon allegedly "illegal" activity, the Court should dismiss for the same reason. Finally, the Court should dismiss Plaintiff's claim for punitive damages for failure to allege any aggravating factors to support such a claim.

BACKGROUND

In his Complaint, Plaintiff distinguishes between two separate groups of Defendants. The "Count One" claim, which does not include Defendant Allen Edmonds, arises from alleged violations of the Can-Spam Act of 2003, 15 U.S.C. §§ 7701-7713. In "Count Two,"

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Plaintiff alleges that seven Defendants, of which Allen Edmonds is one, caused a "worm or virus" to be placed on his computer. Plaintiff asserts claims for invasion of privacy and trespass to his computer against all "Count Two" defendants.

Accepting the facts as alleged for the purpose of this motion to dismiss, Plaintiff states that the Defendants either promoted the entry of the virus or worm onto his computer, or benefited from same. Plaintiff claims that the "virus or worm" has damaged his internet browser to the point that the browser becomes non-functional. Plaintiff explains that the "virus or worm" affects the browser when he types in a search on his Google tool bar. If Plaintiff clicks on the sites shown by Google, he alleges he is redirected to a site "promoted by Defendants." Thereafter, Plaintiff cannot access other sites except for those with ads of the Defendants. Plaintiff has not alleged any damages to his browser software except for the manifestation of the "virus or worm" when Plaintiff types searches into the Google tool bar. Plaintiff has not alleged any specific damage to his computer hardware.

On July 6, 2007, pro se Plaintiff filed a voluntary notice of dismissal of the entire Complaint. On July 19, 2007, this Court set aside the notice of dismissal pursuant to Rule 41(a)(1) because one of the defendants had previously served an answer to the Complaint. Because the Complaint fails to state a claim against Allen Edmonds, the Court should dismiss it with prejudice.

LEGAL STANDARD

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief should be granted if, assuming all allegations in the Complaint are true and construing them in the plaintiff's favor, it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Republican*

Party v. Martin, 980 F.2d 943, 952 (4th Cir. 1993). Put another way, a motion to dismiss should be granted if the complaint itself fails to allege the elements for a cause of action or facts sufficient to support such elements. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003). In addition, "the allegations must be stated in terms that are neither vague nor conclusory." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220-21 (4th Cir. 1994).

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR INVASION OF PRIVACY.

North Carolina courts have not recognized a cause of action for invasion of privacy where a plaintiff alleges the electronic intrusion of a "worm or virus" on to a computer. State and federal courts addressing similar factual situations have implicated the requirement for some form of illicit observation, private information-gathering or eavesdropping to sustain such a claim. Because Plaintiff has failed to allege facts sufficient to support his invasion of privacy claim, this Court should dismiss the cause of action.

Under North Carolina law, the tort of invasion of privacy is defined as the intentional intrusion "physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... [where] the intrusion would be highly offensive to a reasonable person." *Miller v. Brooks*, 472 S.E.2d 350, 354 (N.C. Ct. App. 1996). The kinds of intrusion that have been recognized under this tort include "physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another." *Hall v. Post*, 355 S.E.2d 819, 823 (N.C. Ct. App. 1987), *rev'd on other grounds*, 372 S.E.2d 711 (N.C. 1988). Generally, "there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy." *Keyzer v. Amerlink, Ltd.*, 618 S.E.2d 768, 771 (N.C. Ct. App. 2005).

In *Keyzer*, the court upheld summary judgment for the defendants against an invasion of privacy claim involving allegations of intrusive conduct by attorneys and investigators in a civil suit. In that case, the court noted in upholding the trial court's decision that "plaintiffs fail to articulate how these allegations [of invasion], if true, constitute evidence that any of their personal affairs or private concerns were intruded upon. Moreover, none of the plaintiffs [have] produced any evidence . . . that defendants had investigated their personal affairs [or] had spied on, observed, or otherwise obtained *any* information about their private concerns . . . ." *Keyzer*, 618 S.E.2d at 772 (emphasis in original.). North Carolina's formulation of this tort tracks closely with that of the Restatement: A person is liable for the tort of invasion of privacy if he "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs . . . if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977).

In *Interscope Records v. Duty*, 2006 WL 988086 (D. Ariz. April 14, 2006), a federal district court dismissed a state law claim for invasion of privacy in the context of computer usage. Plaintiffs had allegedly accessed the defendant's public folder, a folder which contained illegally copied music. In dismissing defendant's counterclaim for invasion of privacy, the court (citing "intrusion into seclusion" language of the Restatement) held that since the information was gathered from a public folder, no invasion of privacy could have taken place. *Id.* at *3.

In *Hall*, *Keyzer* and *Interscope Records*, the common theme is the illicit collection of private information. For example, the illustrations cited by the court in *Keyzer*, while surely not exhaustive, all implicate some form of spying or observation with the exception of harassing telephone calls.[1] Similarly, the invasion of privacy counterclaim in *Interscope Records* failed because, though the alleged behavior constituted information gathering, the information gathered was done so from a public source. Thus, the implication from the court's analysis is that invasion of privacy should involve some sort of private information collection about a person. *See also* Daniel B. Game, Alan G. Blakely, & Matthew J. Armstrong, The Legal Status of Spyware, 59 Fed. Comm. L.J. 157 (2006)(discussing invasion of privacy as a cause of action in the computer usage context and noting that "the standard case of violation of an individual's rights of privacy leading to tort liability involves some sort of eavesdropping") *and Hamberger v. Eastman*, 206 A.2d 239, 241 (N.H. 1964) (discussing thoroughly the invasion of privacy tort and noting that the "tort of intrusion" is not limited to physical intrusion, but has been extended to eavesdropping upon private conversations by means of wire-tapping and microphones).

Here, Plaintiff has failed to allege any form or type of illicit observation, spying or eavesdropping by Allen Edmonds. In fact, nowhere in the complaint does the Plaintiff allege Allen Edmonds collected any sort of information (private or otherwise) or made any observations of him whatsoever. Thus, the Court should dismiss Plaintiff's claim of invasion of privacy.

II. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR TRESPASS.

Similar to Plaintiff's invasion of privacy claim, North Carolina courts have not recognized trespass to chattels as a cause of action in the context of computer usage. The

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[1] Plaintiff's complaint does not contain any allegations analogous to harassing telephone calls.

Court of Appeals for the Fourth Circuit has refrained from extending traditional torts to the computer realm where the state courts and legislature have not addressed the issues. *See Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 359 (4th Cir. 2006)). In *Omega World Travel*, the Fourth Circuit addressed Mummagraphics' counter-claim that unsolicited e-mails into its system had resulted in a trespass to chattels. Applying Oklahoma law, the court noted that "[w]e proceed with particular caution in this area because Oklahoma courts appear never to have recognized this tort based upon intangible invasions of computer resources."[2] *Id.* In the instant case, particularly where this pro se Plaintiff previously attempted to *voluntarily* dismiss his claims against all defendants, this Court should decline the invitation to extend the common law tort of trespass to chattels to this claim.

Further, the Fourth Circuit in *Mummagraphics* recognized that a trespass to chattels based upon computer intrusions "do[es] not allow 'an action for nominal damages for harmless intermeddlings with the chattel.'" *Id.*, *quoting Intel Corp. v. Hamidi*, 71 P.3d 296, 302 (2003); *see also, Restatement (Second) of Torts* § 218 cmt. e (1965). Although the Fourth Circuit recognized that a trespass to chattel claim may be viable in the context of computer intrusion, the court concluded that summary judgment against the company's counterclaim was appropriate because Mummagraphics failed to provide any evidence that eleven e-mail messages had damaged the company's computer system.[3]

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[2] North Carolina's definition and application of trespass to chattels is virtually identical to Oklahoma law. Under North Carolina law, a plaintiff must show that he or she "[1] had either actual or constructive possession of the personalty or goods in question at the time of trespass . . . [and; 2] that there was an unauthorized, unlawful interference or dispossession of the property . . ." *Fordham v. Eason*, 521 S.E.2d 701, 704 (N.C. App. 1999)(internal citations and punctuation omitted). Courts applying North Carolina law to the claim of trespass to chattels have referred to the Restatement (Second), as do Oklahoma courts. *See McDowell v. Davis*, 235 S.E.2d 896, 901 (N.C.Ct.App. 1977)(citing Restatement for element of trespass to chattel); *Woodis v. Oklahoma Gas & Electric Co.*, 704 P.2d 483, 485 (Okla. 1985), quoting Restatement.

In his Complaint, Plaintiff has only vaguely described the nature of the purported injury to his internet browser. Taking the facts as alleged, Plaintiff claims that the "virus or worm" affects Plaintiff's browser when he "type[s] in a search word on his Google tool bar." Apparently, the alleged "virus or worm" does not affect the browser software if Plaintiff refrains from using this tool bar feature. Plaintiff otherwise has full use of his internet browser and theoretically can perform searches through the Google website. Accordingly, even though Plaintiff generally alleges a loss of money, time and aggravation, the specific facts as alleged amount can only amount to nominal damages. Accordingly, Plaintiff's claim of trespass should be dismissed.

III. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION BASED UPON ILLEGAL CONDUCT.

In Count II of the Complaint, Plaintiff further states that the Defendants' alleged conduct is "illegal." Plaintiff does not cite any state or federal law to support his proposition. Further, Plaintiff has not raised any claims except the aforementioned torts of trespass and invasion of privacy based upon the defendants' alleged activity. Therefore, to the extent that Plaintiff has implied a claim based upon illegal activity, Allen Edmonds asks the court dismiss his cause of action for failure to state a claim. *See Estate Constr. Co.*, 14 F.3d at 220-21 (allegations that are "vague or conclusory" and that allege mere violations of law are insufficient to survive a Rule 12(b)(6) motion to dismiss).

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[3] Other courts have extended the tort of trespass to chattel to causes of action where the plaintiff has alleged sufficient injury. *See Compuserve Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015, 1022 (S.D. Oh. 1997); *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1567 (1996); *Sotelo v. DirectRevenue*, LLC, 384 F.Supp.2d 1219, 1231 (N.D. Ill. 2005).

IV. PLAINTIFF FAILS TO PLEAD AGGRAVATING FACTORS TO SUPPORT PUNITIVE DAMAGES.

Punitive damages are awarded only if the Plaintiff can prove the aggravating factors of fraud, malice, or willful and wanton conduct. *Faris v. SFX Entertainment, Inc.*, 2006 WL 3690632 (W.D.N.C., 2006); *see also* N.C. Gen. Stat. § 1D-15 (establishing the standards for recovery of punitive damages.) Plaintiff has not alleged any specific facts suggesting that Defendants have perpetrated fraud, acted with malice, or otherwise acted in a willful or wanton manner. Therefore, Plaintiff's claim for punitive damages also should be dismissed.

CONCLUSION

Because the facts as alleged in the Plaintiff's Complaint are insufficient to state a claim for relief as to the moving Defendant Allen Edmonds, the case should be dismissed with prejudice pursuant to Rule 12(b)(6).

This the 23d day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2007, the **MEMORANDUM IN SUPPORT OF RULE 12(B)(6) MOTION TO DISMISS** was filed electronically with the Clerk of Court through ECF, and by serving a copy by depositing a copy of the same in the US Mail, first class postage pre-paid, to the following attorneys for said parties:

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This the 23d day of July, 2007.

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